

Chapter 6: Contractual Documents and Procedures

This chapter describes the process by which the DOT will commit to provide credit assistance to a selected project sponsor (also termed “borrower” or “obligor”). The chapter also describes the two major contractual documents that will be used for the TIFIA program: the term sheet and the credit agreement.

Each of the contractual documents is used for specific purposes as summarized below in Exhibit 6-A. The term sheet establishes the DOT’s legal commitment and triggers the obligation of budget authority for the project. The credit agreement is the definitive agreement between the DOT and the borrower, containing all the terms and conditions pursuant to which the credit assistance is provided.

Exhibit 6-A: Summary of Major TIFIA Contractual Documents

Contractual Document	Major Certifications/ Required Documents	Resulting Action
Term Sheet	<ul style="list-style-type: none">• Credit Assessment: Preliminary rating opinion letter*• Environmental Clearance: ROD, FONSI, or Categorical Exclusion• Planning Documents: Inclusion in the STIP	<ul style="list-style-type: none">▪ Obligation of budget authority (i.e., legal commitment)▪ Establishment of interest rate for a line of credit▪ If for a multi-year DOT commitment, administrative reservation of out-year funding
Credit Agreement	<ul style="list-style-type: none">• Credit Assessment: Investment grade credit rating*• Environmental Clearance: ROD, FONSI, or Categorical Exclusion (previously provided)• Planning Documents: Inclusion in the STIP (previously demonstrated)	<ul style="list-style-type: none">▪ Definitive establishment of lender-borrower relationship▪ Authorization for disbursement of credit assistance, subject to satisfaction of any conditions in the credit agreement▪ Establishment of interest rate for a direct loan

* Notes on credit opinions and ratings: 1) The preliminary rating opinion letter should assess the investment grade potential of the project's senior debt obligations and the default risk of the TIFIA instrument. 2) The credit rating must evidence an investment grade rating on the senior debt obligations (or the TIFIA credit instrument if there are no debt obligations senior to the TIFIA facility) and include a revised assessment of the default risk of the TIFIA instrument.

If a TIFIA project is also financed with other DOT funds, the recipient of TIFIA credit assistance will be required to comply with applicable modal project requirements and approvals as well as the TIFIA program requirements. These may include approval for

innovative contracting approaches and "mega project" procedures such as submission of an approved financial plan and annual update. The DOT is implementing a coordinated TIFIA process that recognizes existing modal agency processes to minimize duplication of effort by project sponsors, while ensuring effective oversight and monitoring of the federal investment in major transportation projects. The TIFIA credit agreement will specifically address finance plan requirements and monitoring procedures.

Section 6-1

Term Sheet

The term sheet is a contractual agreement between the DOT and the project sponsor that sets forth certain business terms and conditions of TIFIA credit assistance for the project. The DOT's issuance of this document triggers the DOT's obligation (i.e., legal commitment) of budget authority.

Term Sheet Prerequisites

Before issuing a term sheet, the DOT will confirm that all prerequisites for the obligation of funds have been satisfied. As shown in Exhibits 3-A and 6-A, these prerequisites include: (i) submission of the preliminary rating opinion letter as part of the TIFIA application; (ii) the project's receipt of its ROD, FONSI, or Categorical Exclusion; and (iii) the project's inclusion in the approved STIP.

The term sheet obligates budget authority and binds the DOT and the project sponsor to the specified terms; it does not bind the DOT to details of the sponsor's application. Further, the term sheet does not trigger a disbursement of funds to the project sponsor. Disbursements will occur only after the project sponsor has: (i) obtained an investment grade rating on the senior debt obligations and a revised credit opinion on the default risk of the TIFIA instrument; and (ii) signed a credit agreement with the DOT, which includes a negotiated annual draw schedule.

Term Sheet Contents

General rules concerning the terms for secured (direct) loans, loan guarantees, and standby lines of credit appear at 23 U.S.C. 183 and 184 and are also summarized in Chapter 2. More specific terms will be determined on a project specific basis.

Since term sheets serve primarily as the obligating instrument for TIFIA credit assistance, they include only basic terms and conditions related to the DOT's provision of credit assistance. Typically, the following will appear in every term sheet:

- parties to the agreement (e.g., lender, borrower, and guaranteed lender, as applicable);
- type(s) of credit instrument (i.e., secured direct loan, loan guarantee, or standby line of credit);
- description of the project;

- estimated total project costs and total TIFIA-eligible project costs;
- maximum amount of credit assistance;
- method for establishing the interest rate;
- estimated final maturity date;
- source of payment and security, including lien structure and TIFIA credit instrument priority; and
- conditions, if applicable, and deadline date for execution of a credit agreement.

Term Sheet Conditions: Future-Year Commitments

For projects with extended construction periods and/or special financing needs, the Secretary may consider making future-year contingent commitments of budget authority and associated credit assistance. This might be considered, for example, if a selected project required the obligation of more resources than were available in the current fiscal year. In such a circumstance, the term sheet would include a provision by which the DOT would administratively reserve TIFIA funding for the project and commit to providing federal credit assistance at a future time, upon satisfaction of specified conditions (such as project-specific milestones). Any such term sheet contingent commitments would be subject to the future availability of obligation authority. The DOT would initially obligate budget authority for the project only in the current fiscal year, and would not obligate budget authority in future years until the conditions of the term sheet were met and the availability of sufficient budget authority was confirmed.

The DOT generally does not anticipate making future-year contingent commitments; it would issue a term sheet containing such a condition only in the most exceptional case. The DOT would make a future-year reservation of funds only when the project seeking such commitment had met all TIFIA eligibility requirements and been partially funded out of the current fiscal year's program. In order to ensure additional projects' access to the program in future years, the DOT would never reserve more than 50 percent of the amount of budget authority authorized for a single fiscal year.

Section 6-2

Credit Agreement

The credit agreement is the definitive agreement between the DOT and the project sponsor (and the guaranteed lender, if applicable). It specifies all terms and conditions of the credit assistance and authorizes the funding of the TIFIA credit instrument. Following execution of a credit agreement and disbursement of funds, according to the project's needs (i.e., on a reimbursable basis in accordance with a negotiated annual draw schedule), the project sponsor is required to provide repayments according to the terms of the agreement.

Credit Agreement Prerequisites

In order for the DOT to execute the credit agreement and disburse funds, the project sponsor must satisfy at a minimum any requirements set forth in the term sheet. Also, the project sponsor must present the investment grade rating on the senior debt obligations and a revised opinion on the default risk of the TIFIA credit instrument. The deadline to execute the credit agreement will be stipulated in the term sheet.

Prior to closing a TIFIA credit agreement, the project sponsor will be required to submit an approved plan of finance (reflecting changes to the preliminary plan presented in its application proposal resulting from detailed negotiations with the DOT) and an approved project management and monitoring plan.

The DOT reserves the right to review and approve, as may be appropriate, all related project documents, including, but not limited to, design-build contracts, development agreements, and funding agreements with third parties.

Credit Agreement Contents

The contents of the credit agreement will include both standard provisions and transaction-specific provisions. While the project sponsor and the DOT will execute the credit agreement for a direct loan or line of credit, the credit agreement for a loan guarantee will be executed by the guaranteed lender, the DOT, and the project sponsor. Additionally, the guaranteed lender will execute a separate loan agreement with the project sponsor, and the project sponsor will execute a borrower's certificate, compliance, and loan agreement with the DOT. Depending on the nature of the transaction, additional documents, such as an intercreditor agreement, may also be necessary.

Generally, project sponsors can expect credit agreements to include, in addition to the items listed under "Term Sheet Contents," the following:

- detailed description of pledged security and security features (e.g., rate covenants);
- flow of funds;
- repayment terms;
- representations and warranties;
- borrower covenants;
- annual disbursement schedule and conditions for draws on the credit instrument;
- amortization schedule for the credit instrument and final maturity of the credit instrument;
- finance plan requirements; and
- monitoring and reporting requirements.

The credit agreement will also include the form of requisition for disbursements and the note form.

Section 6-3

DOT Oversight and Monitoring Requirements

Following execution of a credit agreement, the DOT will periodically evaluate the credit status of each project receiving TIFIA assistance. This periodic review has three purposes: (i) to provide the DOT with an oversight tool for ensuring the project sponsor's compliance with the provisions of the credit agreement; (ii) to monitor the overall status of the project; and (iii) to assist the DOT and the Office of Management and Budget (OMB) in identifying any changes to the credit risk posed to the federal government under any given credit agreement.

As part of its oversight and monitoring of TIFIA projects, the DOT will routinely update its information on credit quality, construction schedules, legal issues, revenue forecasts, and financial projections. Accordingly, project sponsors will be required to provide ongoing financial and project information not only during construction, but so long as any credit instrument is outstanding and/or until any debt obligation to the federal government is fully repaid. Documentary evidence that may be requested for each project includes: audited financial statements, updated budget and cash flow projections, audit reports, sources and uses of funds, coverage ratios, project schedules, operating statistics, and management updates. In addition, this reporting must include an approved annual update to the project's financial plan in accordance with the requirements specified in the credit agreement. Each project sponsor will be required to give notice to the DOT of material events, including litigation, which could affect the credit quality of the project.

The project sponsor is also required to provide, at no cost to the federal government, ongoing credit evaluations of the project and debt obligations, including the TIFIA credit instrument. These surveillance reports must be prepared by a nationally recognized credit rating agency throughout the life of the TIFIA credit instrument. The project sponsor must furnish the DOT with any other credit surveillance reports on the TIFIA-assisted project as soon as they are available.

Oversight and monitoring will also include site visits, periodic status meetings with the project sponsor, and reviews of independent engineer and/or other relevant reports (as applicable). The TIFIA JPO will coordinate oversight and monitoring activities with the appropriate DOT field offices.

To the extent feasible, the DOT will ensure that such reporting requirements are both applicable to the project (depending on relevant laws and regulations) and consistent across modes. The updated information will be used by the DOT to adjust, as necessary, its original credit subsidy cost estimates for individual projects (see Appendix B for details). Each credit agreement between the DOT and a project sponsor will specify the types of ongoing documentation required by the DOT and the frequency of such information requests. The credit agreement will also authorize the DOT to commence increased monitoring and reporting, as may be necessary, to ensure the continued credit quality of the project and minimize the government's risk.

Section 6-4

DOT Loan Servicing

The DOT has a banking firm under contract to perform loan servicing for TIFIA credit instruments. The services provided under the contract include credit accounting, collections, maintenance of documents, and financial reporting. A TIFIA borrower will be charged an annual fee for loan servicing activities associated with each TIFIA credit instrument. This fee will be set according to the DOT's out-of-pocket costs for loan servicing and may be adjusted annually.

The DOT will provide general payment instructions to the borrower for each credit agreement. Further, at least 30 days prior to a payment date, the loan servicer will notify the borrower of the date and amount due in accordance with the payment schedule in the credit agreement. The loan servicer will also bill each borrower annually for servicing fees in accordance with the provisions in the credit agreement.